No. 13059

In the United States Court of Appeals for the Ninth Circuit

CALIFORNIA ELECTRIC POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

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JURISDICTION

The jurisdiction of the district court was invoked by appellant under 28 U. S. C. 1346 (b), formerly part of the Federal Tort Claims Act[1] (R. 1). This Court's jurisdiction rests upon 28 U. S. C. 1291 by reason of a notice of appeal, filed July 18, 1951, from a judgment in favor of the United States entered on June 28, 1951 (R. 16).

[1] The Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921 *et seq.*) was repealed, but its provisions were reenacted into law under the revision of the Judicial Code as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671–2680, effective September 1, 1948 (62 Stat. 683, 862).

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STATEMENT

California Electric Power Company instituted this action against the United States under the Federal Tort Claims Act to recover damages caused to its electric transmission line by the crash of a Navy target plane (R. 3–5). The complaint was based on two causes of action: (1) trespass, "on the theory that the [United States] was engaged in ultrahazardous activities," as to which the "doctrine of liability without fault" was relied upon (R. 19, 77–79) and (2) negligence, inferable through the doctrine of *res ipsa loquitur* (R. 28, 76).

It was undisputed that the crash occurred on March 8, 1950, that the Navy target plane was shot down by Navy pilots engaged in air gunnery exercises over the Chocolate Mountain Gunnery Range, and that the portion of appellant's transmission line which was damaged was located within that Range (R. 20–21). The United States denied, however, that the crash constituted a trespass or that it resulted from negligence on the part of any Government employee (R. 7, 8, 28, 29).

At the trial, appellant introduced evidence on the question of damages, then rested (R. 23–27). The Government moved to dismiss the complaint as to both causes of action on the ground (1) that the theory of trespass liability without fault did not apply and (2) that appellant had failed to establish any negligence, and that the facts did not warrant application of *res ipsa* doctrine (R. 27, 33). This motion was denied without prejudice (R. 35). The

district court also specifically ruled that the doctrine of *res ipsa* "does apply in this case" (R. 35, 87).

The evidence for the United States showed:

1. *Extent and Remoteness of Area Within the Gunnery Range.*—The Chocolate Mountain Gunnery Range was 70 miles in length and 27 miles in width (R. 43). It "was in a remote part of" California with "no habitation around that could be affected by the [gunnery] practice" for which it was used (R. 4, 90). The land within the Range had "been condemned by the United States as part of the war effort," and was located "out in an isolated region selected because of its remoteness from habitation or population" (R. 89, 90). Appellant's transmission line right-of-way across the Range had apparently not been condemned. The right-of-way constituted "a very narrow strip as compared with the extent of the terrain [in the Range] that [was] used for training purposes" (R. 89).

2. *Crash of Target Plane Within the Gunnery Range.*—(a) On the day of the crash, several Navy planes were firing at the target plane, which was pilotless and operated by means of radio controls in two other Navy planes (R. 40-41). The mission of the planes in the firing group was to hit and shoot down the target plane (R. 43, 50–51).[2] The pilots

[2] If the firing group "failed in the marksmanship test" the target plane "is returned and landed at the home base [by the control pilots] and used all over again" (R. 51). But usually, as in the instant case, the firing groups accomplished their mission and shot down the target plane. In only a "small percentage" of cases do the control pilots bring the target plane back (R. 57).

in the two control planes directed the flight of the target plane at an 8000 foot elevation until they reached the center of the Range, where the target plane was hit by the planes in the firing group (R. 38, 55, 73). The target plane, in accord with the routine practice, was allowed to crash to the ground within the Range (R. 42-43). It was only when it appeared that the target plane would not crash within the Range but would "head towards the boundary of the area" that it was customary for the pilots in the control planes to "charge [their] guns and pull up close enough to the [target] plane" to "shoot it down" within the Range and thus prevent it from crashing beyond the remote region in which the Range was located (R. 42, 43, 56). Since the target plane, on the day in question, was hit and went "into a deep spiral," about 4 or 5 miles wide, "in the center" of the Range, there "was not much reason for [the control pilots] trying to" shoot it down (R. 38, 43, 44, 72). This was "the same ordinary procedure" followed before on "many, many occasions" (R. 45, 59, 64, 70).

(b) Even if there had been any reason for the control pilots to attempt to direct the course of the target plane after it was struck, there "was no way whatsoever" that could have been accomplished (R. 52). Prior to takeoff, careful inspection showed that the radio equipment in the target plane was "in perfect condition" (R. 71). But that equipment had been destroyed when struck by the firing group and the control pilots could no longer thereafter direct the target plane's flight (R. 61).

(c) The control pilots, who were also flying at an 8,000-foot altitude at the time the target plane was struck, did not see the electric transmission line from that altitude (R. 46). It would have been "impossible" to see the line from such a height even if the pilots had been looking for the line instead of concentrating on the flight of the target plane (R. 46, 68, 90). It was only when the pilots went down "clear to the ground" to investigate the crash that the line was first noticed (R. 44, 49). That was "the first time" the control pilots "realized [the] power lines were there" (R. 49). The pilots had been briefed before the mission but the presence of the power line had not been pointed out to them (R. 45). They had seen a map of the area, however, and knew that the power line was "perpendicular to the left of the range approximately halfway up" (R. 46–47, 57). Satisfactory firing missions could be accomplished only by use of the entire area over the Range, including that over the power line (R. 47, 62). For that reason, the orders to the firing groups permitted them to shoot down the target plane "within any place" in the Range (R. 60).

After introducing the evidence, the United States renewed its motion to dismiss the complaint, reasserting that neither the trespass theory of liability without fault nor the doctrine of *res ipsa loquitur* is applicable and that appellant had failed to establish any negligence on the part of any government employee (R. 74). The motion was again denied "without prejudice to the determination of the case on the

minutes" (R. 75). And, after carefully reviewing and appraising the facts (R. 87–92), the district court ruled that while the doctrine of *res ipsa loquitur* applied, the United States had "overcome any presumption or inference of carelessness or negligence created by said doctrine" (R. 13). The court further found that the crash of the target plane did not constitute a trespass for which the United States could be held liable (R. 11). Judgment was accordingly entered in favor of the United States (R. 15).

QUESTIONS PRESENTED

1. Whether the district court's finding that there was no negligence on the part of any government employee is clearly erroneous.

2. Whether a claim for damages based on the trespass theory of liability without fault is actionable under the Federal Tort Claims Act which permits suit only on claims founded on a *respondeat superior* liability.

STATUTES INVOLVED

1. Sections 1346 (b) and 2674 of Title 28, United States Code [formerly provisions of the Federal Tort Claims Act],[3] provide in pertinent part:

> SECTION 1346. *United States as defendant.*
>
> * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court

[3] See footnote 1, *supra*, p. 1.

of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

SECTION 2674. *Liability of United States.*—The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. Other sections of the Federal Tort Claims Act, as originally enacted (60 Stat. 842, 28 U. S. C. 931), provided in pertinent part:

SEC. 424. (a) All provisions of law authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, are hereby repealed in respect of claims cognizable under part 2 of this title and accruing on and after January 1, 1945, including, but without

limitation, the provisions granting such authorization now contained in the following laws:

* * * * *

Public Law Numbered 112, as amended, seventy-eighth Congress, approved July 3, 1943 (57 Stat. 372; U. S. C., title 31, secs. 223b, 223c, and 223d).

* * * * *

(b) Nothing contained herein shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss, injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under part 2 of this title.

ARGUMENT

Neither of the two causes of action alleged in this litigation warrant recovery of damages against the United States under the Federal Tort Claims Act.

The district court found that there was no negligence on the part of any government employee and that the crash was therefore not the proximate result of any such negligence. This finding is not clearly erroneous. To the contrary, it is supported by an abundance of substantial evidence. Accordingly, as we show in Point I, the district court properly refused to award damages on the negligence cause of action asserted by appellant.

The second cause of action, based on the trespass theory of liability without fault, is not available in this case under California law, as shown by Point II, *infra,* pp. 15–18. Moreover, even if the facts and law warranted imposition of liability without fault under California law as against a private airplane owner, it is our position that that theory of liability affords no basis for relief under the Federal Tort Claims Act. In this connection, we point out that the language of the Act and all pertinent decisions demonstrate that the only type of liability cognizable thereunder is a *respondeat superior* liability; that the trespass or liability without fault theory is a liability having no relationship to the *respondeat superior* type of liability; and that it therefore is not a permissible basis for recovery of damages under the Federal Tort Claims Act.

Although no relief is available under the Federal Tort Claims Act, that does not mean that an innocent landowner whose property is damaged because of the nonnegligent crash of military aircraft is left remediless against the United States. In Point III, we show that in the Military Claims Act Congress has provided a comprehensive system of relief for damage claims arising out of the operation of military aircraft and based on the theory of liability without fault. The existence and availability of this remedy is by itself, we submit, sufficient to preclude the granting of alternative relief under the Federal Tort Claims Act. Here, the need for limiting the claimant to the Military Claims Act remedy is underscored by the language of the Tort Act which requires exclusion

from its coverage of claims cognizable under the Military Claims Act.

I

The district court's finding that there was no negligence is not clearly erroneous and may not therefore be set aside on appeal

At the trial, as noted *supra,* p. 2, appellant introduced no evidence to establish negligence on the part of any government employee. The district court nevertheless refused to dismiss the negligence cause of action when appellant rested, ruling that the doctrine of *res ipsa loquitur* applied and created an inference of negligence. We do not agree that the facts of this case warrant application of the *res ipsa* doctrine. However, even if it is assumed that *res ipsa* was properly invoked by the district court, it is clear that where the defendant, as here, presents direct evidence contradicting the inference of negligence arising from *res ipsa,* "the issue is one of fact" for determination by a finding of the jury or by a finding of the judge in a nonjury case. *Rayl* v. *Syndicate Building Co.,* 118 Cal. App. 396, 398, 5 Pac. 2d 476, 477. This Court has itself recognized that under California law the question of negligence is "one of fact for the determination of the trier of facts" and that it is immaterial whether the determination is "derived from undisputed facts" or from "conflicting testimony." *United States* v. *Fotopulos,* 180 F. 2d 631, 636. See also *Wahlgren V. Market Street Railway Co.,* 132 Cal. 6 56, 663, 62 Pac. 308; *Tuttle* v. *Crawford,* 8 Cal. 2d 126, 131–

132, 63 Pac. 2d 1128; *Davidson Steamship Co.* v. *United States,* 205 U. S. 187, 190–191.

The trial judge's finding of fact in the instant case was that no agent, servant or employee of the United States was negligent and that the crash did not, therefore, result from "any negligence or carelessness on the part of [the United States] or any of its agents, servants and/or employees." (Finding of Fact II, R. 12.) Such a finding by the trier of facts, who observed the witnesses, appraised their credibility, determined the weight to be given to their testimony and drew inferences from the facts established, must, as this Court has stated, be sustained on appeal unless clearly erroneous. *United States* v. *Fotopulos,* 180 F. 2d 631, 634; Rule 52, Federal Rules of Civil Procedure; see also *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co.,* 248 Fed. 609, 616 (C. A. 9), affirmed 249 U. S. 12, 30.

The evidence introduced by the Government makes it obvious that the finding of fact here involved is not clearly erroneous. That evidence, we submit, abundantly justifies the finding made by the trial court. Appellant, in fact, concedes that the evidence showed that the control pilots "exercised due care in following out their orders" and "did not negligently" let the target out of control. Appellant's Opening Brief, p. 11.[4] Nor was there any negligence in allow-

[4] Despite this concession, appellant would impute negligence to the control pilots by asserting that "no attempt was made to destroy or cause the drone to crash in a spot other than where it was headed. Consequently, appellee intended the drone to crash just where it did." Appellant's Opening Brief, pp. 13–14. However, as carefully explained in the evidence, destruction of the tar-

ing the firing groups to shoot down the target anywhere within the confines of the Range. The evidence established that the Range covered a remote and isolated area, 70 miles long and 27 miles wide and that the power line constituted "a very narrow strip" running midway across the Range. This narrow strip, when "compared with the extent of the terrain" makes it apparent that it was not reasonable to expect that a target, upon being hit, would have crashed into the narrow strip (R. 89). Moreover, satisfactory firing missions could be accomplished only by using the entire area over the Range, including that over the narrow strip (R. 43, 46–47, 62). The evidence also showed that it was impossible to see the power line from the 8,000-foot altitude at which the planes were firing; that the target plane, immediately after it was struck, went into a spiral about 4 or 5 miles wide before hitting the power line; and that the control pilots first saw that line only after they had gone "clear to the ground."

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get plane would not have resulted in its disintegration in the air. "When you destroy it, it doesn't disintegrate in the air. You merely stop" the target from progressing in order to make sure that it crashes within the confines of the range (R. 56). Thus, even if the control pilots had "destroyed" the target plane, it would have meant doing no more than what the pilots in the firing group had already done—that is to shoot down the target plane within the range. In addition, since the radio equipment in the drone was damaged when hit by the planes in the firing group, the control pilots could no longer thereafter direct the course of flight of the target plane (R. 61). Furthermore, since the control pilots were flying at an eight thousand foot altitude and could not see the power line from that height (R. 46), it is difficult to understand appellant's contention that they "intended the drone to crash just where it did," *i. e.*, into the power line.

In appraising the foregoing evidence, the court below stated that it "could not find anything here that would justify" a finding that the government employees "did anything recklessly or carelessly or negligently" (R. 91). That evidence, the court further observed, could not, "even under the application of *res ipsa loquitur*" justify a finding of negligence (R. 92). To the contrary, that evidence fully sustains the trial court's finding that no government employee was negligent. Since that finding is not therefore clearly erroneous, it may not be upset on appeal.

II

The trespass theory of liability without fault, inapplicable here as a matter of California law, affords no basis for recovery of damages under the Federal Tort Claims Act

There also was no error committed by the court below in rejecting appellant's other cause of action—that based on the trespass theory of liability without fault. This theory of liability has been rejected by California law as far as airplane crashes are concerned. In any event, it affords no basis for relief under the Federal Tort Claims Act.

A. California law, in accord with most other jurisdictions, does not consider aviation an extrahazardous activity for which there is absolute liability

In urging the trespass theory of liability without fault, appellant relies primarily on "the theory that the defendant here was engaged in ultrahazardous activities" (R. 19). That theory, appellant points out, is set forth in the *Restatement of Torts* and has been recognized by the California Supreme Court.

The Government, it further argues, should therefore have been held liable here "under the law of the State of California, on a theory of absolute liability." Appellant's Opening Brief, p. 16.

The doctrine that a person engaging in an extrahazardous activity is liable for damages resulting from that activity even in the absence of any negligent or intentionally wrongful act, stems from the famous English case of *Fletcher* v. *Rylands,* L. R. 1 Ex. 265 (1866), affirmed, L. R. 3 H. L. 330 (1868).[5] There can be no doubt that the doctrine is asserted in the *Restatement of Torts,* which apparently used the *Rylands* case in formulating its rule to regulate liability for activities too dangerous to be governed by the general law of negligence yet too useful to be penalized as a nuisance. Recognizing the general rule that there is no liability for an "unintentional and nonnegligent" invasion of property even where harm results,[6] the *Restatement* announces a single

[5] Water from defendant's reservoir burst through an ancient filled-up mineshaft and flooded plaintiff's adjacent mine. Although defendant's contractor had been negligent in constructing the reservoir, this negligence was not imputed to defendants. Instead, the Court of Exchequer imposed liability on the ground "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." On appeal, the opinions in the House of Lords limited use of the rule to situations involving a "nonnatural" use of the land.

[6] Reliance on the extrahazardous activity theory of liability necessarily assumes that the trespass was neither negligent nor intentional. Section 166 of the *Restatement* declares: "Except where the actor is engaged in an extrahazardous activity, an unintentional and nonnegligent entry on land in the possession of

class of exceptions for so-called ultrahazardous activities. Section 519 states that

> * * * one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

Section 520 goes on to define an activity as ultrahazardous if it—

> (a) Necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and
> (b) Is not a matter of common usage.

Finally, *Comment b* to Section 520 cites aviation as one of the ultrahazardous activities to which the special rule applies "because even the best constructed and maintained aeroplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained, and operated, may crash to the injury of persons, structures, and chattels on the land over which the flight is made."

There also is no doubt that this special rule of liability for ultrahazardous activities has been applied to certain kinds of activity in California. See

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another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest."

Luthringer v. *Moore,* 31 Cal. 2d 489, 190 Pac. 2d 1 (fumigator held absolutely liable for injuries caused by escape of lethal hydrocyanic gases); *Green* v. *General Petroleum Corp.,* 205 Cal. 328, 270 Pac. 952 (oil well driller held absolutely liable for damages caused by "blow out" due to gas pressure accumulation). But it is significant that this absolute liability theory has been expressly rejected by the courts of California as far as airplane crashes are concerned. Thus, in *Johnson* v. *Central Aviation Corp.,* 103 Adv. Cal. App. 125, 133–134, 229 Pac. 2d 114, 120, the court recently noted that "formerly" aviation was considered an "ultrahazardous activity" as to which "many states did impose absolute liability." "However," the court pointed out, "this view has come to be modified and now * * * under the more modern view" adopted in California the ordinary standards of due care apply. *Ibid.*

The doctrine of absolute liability for airplane crashes has been rejected not only by the California courts, but by its legislature as well. This is made apparent by comparison of the provisions of the State Aeronautics Act with those in the Uniform Aeronautics Act. The latter Act, in addition to declaring airspace a public highway and providing for the lawfulness of flight over the land of others, follows the *Restatement* rule and imposes absolute liability on the owner of every aircraft operated over land for injuries to persons or property on the land "whether such owner was negligent or not." 11 Uniform Laws Annotated, Sec. 5. The California Aeronautics Act adopts all of the provisions of the Uniform Act deal-

ing with the lawfulness of flight and use of airspace as a public highway. Cf. Deering, *General Laws of California,* Art. 151a, Sections 2 (b), (c), (d) and (g) with Sections 2, 3, 4 and 6 of the Uniform Act. But the California legislature deliberately refused to adopt Section 5 of the Uniform Act which, like the *Restatement* rule, would have imposed absolute liability on the owner of the plane. Consequently, the general tests of negligence and "want of ordinary care or skill" [7] also furnish "the basis for fixing liability * * * for accidents resulting from the operation of aircraft" in that State. Opinion of the Attorney General of California, 2 C. C. H. Aviation Law Reporter, par. 23055 (1948). The law in California with respect to airplane crashes is no different than the law applying to automobile accidents. In both instances, there is no liability in the absence of a deliberate or negligent tort.[8]

Since the California courts and legislature have expressly rejected the absolute liability theory with respect to airplane crashes,[9] we submit that the court

[7] See Deering, *California Civil Code (1949)*, Section 1714.

[8] Even with respect to liability for injuries to a guest, the law in California is exactly the same for airplane and automobile accidents. Cf. Deering, *General Laws of California*, Art. 151a, Section 15 with California Motor Vehicle Code, Section 403.

[9] In other jurisdictions, there appears to be only a single decision, rendered by a lower New York court in 1933, which has held aviation to be an ultrahazardous activity and awarded damages to a landowner on this theory for losses caused by a crashing airplane. *Rochester Gas & Electric Corp.* v. *Dunlop*, 148 Misc. 849, 266 N. Y. Supp. 469. In the court below, appellant stressed the fact that its "position in this case is very well stated by the Court in [the] *Rochester Gas*" case (R. 79). However, none of the many reported cases involving airplane crashes since *Rochester Gas &*

below properly rejected that theory in refusing to hold the United States liable under the Tort Claims Act which requires determination of the Government's liability "in accordance with the law of the place where the act or omission occurred." Section 1346 (b), *supra*, p. 7.[10]

B. The Absolute Liability Without Fault Theory Affords No Basis for Recovery Under the Federal Tort Claims Act

Even if the facts of this case warranted a holding that the airplane crash resulted from the miscarriage of an extrahazardous activity as to which liability without fault could be imposed under California law, it is our position that that type of liability is not cognizable under the Federal Tort Claims Act and may

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Electric Corp. v. *Dunlop*, *supra*, has followed that decision in affixing liability on the theory that an airplane is an ultrahazardous instrumentality. On the contrary, where the notion of such liability has been considered at all, it has been rejected. See *Kadylak* v. *O'Brien*, 1941 U. S. Av. Rep. 8 (U. S. D. C., W. D. Pa.); *Herrick and Olsen* v. *Curtiss*, 1932 U. S. Av. Rep. 110, 113, 117, 118, 122, 131 (N. Y. Sup. Ct., Nassau Co.); Rhyne, *Aviation Accident Law* (1947), pp. 64–5.

It is also significant that this notion of absolute liability for airplane crashes has also been rejected by the Commissioners on Uniform State Laws, who, in 1943, withdrew the Uniform Aeronautics Act from the list of those recommended to the States for adoption. See 11 Uniform Laws Annotated, Cum. Supp. (1949), p. 11. And the members of the "American Law Institute, feeling that the rules stated in the *Restatement*" of Torts concerning absolute liability for airplane crashes "were undesirable * * *, decided to cooperate as early as 1938 with" the Uniform Commissioners in drafting a proposed act based on negligence rather than absolute liability. Handbook of the National Conference of Commissioners on Uniform State Laws (1938) p. 71; *id.* (1948) p. 147, 149.

[10] The crash giving rise to this action occurred in California and it is undisputed that the law of that state therefore applies.

not therefore be invoked as a basis for recovery of damages.

1. Under the Federal Tort Claims Act, the United States has assumed liability for the negligent or wrongful act of "any employee of the Government while acting within the scope of his office or employment" to the same extent that "a private individual" would be liable. Section 1346 (b), *supra,* p. 7. There can no longer be any doubt that this language incorporates into the Federal Tort Claims Act the common law test of *respondeat superior* for the purpose of determining whether the United States is to be held liable under that Act. The Court of Appeals for the Fifth Circuit, in *United States* v. *Campbell,* 172 F. 2d 500, 503, certiorari denied, 337 U. S. 597, stated that—

> the whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort the *Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of respondeat superior.* [Italics supplied.]

The Court of Appeals for the Fourth Circuit, expressly referring to the quoted language, stated that it was "in thorough accord with both the reasoning and the conclusion of the [Campbell] opinion." *United States* v. *Eleazer,* 177 F. 2d 914, 918, certiorari denied, 339 U. S. 903. Accord: *United States* v. *Sharpe,* 189 F. 2d 239 (C. A. 4); *Rutherford* v. *United States,* 73 F. Supp. 867 (E. D. Tenn.), affirmed, per

curiam, 168 F. 2d 70 (C. A. 6); *Cropper* v. *United States,* 81 F. Supp. 81 (D. C. Fla.); *Long* v. *United States,* 78 F. Supp. 35 (D. C. Cal.).

Respondeat superior liability is a vicarious or derivative liability. Under it, the United States may "not be held liable under the substantive law unless the servant may also be held liable thereunder." *Kendrick* v. *United States,* 82 F. Supp. 430, 432 (D. C. Ala.); *Prechtl* v. *United States,* 84 F. Supp. 889 (D. C. N. Y.). If the employee is free from civil liability, it is obvious that under the *respondeat superior* principle "his employer must also be entitled to a like immunity." *N. O. & N. E. Railroad Company* v. *Jopes,* 142 U. S. 18, 24; *Cromelin* v. *United States,* 177 F. 2d 275 (C. A. 5), certiorari denied, 339 U. S. 944. The master's responsibility under *respondeat superior,* as recognized in a recent California decision, "is dependent on the injured person's right to recover against the employee." *Popejoy* v. *Hannon,* 37 Adv. Cal. 176, 189, 231 Pac. 2d 484. *Respondeat superior* means no more than that the master must answer for a tort for which the servant himself is legally responsible to the person injured. The doctrine presupposes that the employee has violated a duty to that person, exposing himself to personal liability. The master's liability under *respondeat superior* attaches not because the master has violated some duty to the injured person, but simply because the master is secondarily liable for violation of the duty owed by the employee. It is only because the employer has violated no duty to the plaintiff that the employer, who has been held liable in damages under *respondeat superior,* may

recover those damages from the employee who did violate a duty to the plaintiff. This right to indemnity exists because the payment of damages by the employer, the person secondarily liable, leaves him with a right to secure restitution from the employee, the person primarily liable. See, *e. g., Imperial Refining Co.* v. *Kanotex Refining Co.,* 29 F. 2d 193, 201 (C. A. 8). Where the employer is held liable in damages "under the doctrine of *respondeat superior,*" he is entitled to indemnity because "in such a case [the employer] is guilty of no wrongdoing but simply has the misfortune to be legally responsible for the wrongdoing of another." *Hendrix* v. *Employers Mut. Liability Ins. Co.,* 98 F. Supp. 84, 87 (D. C. S. Car.).

The Tort Claims Act, in other words, does not make the United States unqualifiedly liable in tort. It makes the United States liable in tort only where the employee himself is legally liable to the person injured. It is only with respect to such a claim that the Government consented to be liable "in the same manner and to the same extent as a private individual under like circumstances." Section 1346 (b), *supra,* p. 7. Unless the claim is based on a *respondeat superior* liability—that is, a claim for which the employee himself would be personally liable—the claim does not come within the waiver effected by the Tort Claims Act and the equating of the Government with a private individual respecting claims which are covered by the waiver does not begin to operate and is of no help to appellant here. Whether the absolute liability theory urged by appellant is a

respondeat superior liability is critical. To that question we now turn.

2. The liability for losses caused by an ultrahazardous instrumentality is imposed, not because an employee has committed a "negligent or wrongful act" for which he may be held liable to the injured person, but because the instrumentality involved is one which, despite the exercise of all due care, poses a likelihood of injury. Where an employer decides to engage in an extrahazardous activity he becomes liable for the nature of his *activity.* He assumes as part of his business expenses the additional burden of meeting the cost of damages which will inevitably follow simply because he is engaged in that activity, even though it is conducted with all possible care. His employees, on the other hand, are not liable for the nature of their employer's activity; their liability, unlike that of the employer, is predicated only *on the manner* in which they perform the activity. If they act negligently or commit a deliberate wrong, liability for that negligent or intentionally wrongful act may be imposed on them. If they commit no such act, there is no liability *on their part* even though the extrahazardous activity may necessarily result in damages for which their employer must respond. Since the extrahazardous liability theory presupposes that the employees act with all possible care, they themselves would not be subject to any liability if actions for damages were instituted against them. The employees' careful conduct immunizes them from personal liability and their employer may not, therefore, be held liable under the doctrine of *respondeat*

superior. His liability arises out of his decision to engage in the extrahazardous activity, regardless of how carefully his employees conduct that activity. It is a liability which stems from the policy judgment that activities involving the use of ultrahazardous instrumentalities "must be carried on at the risk of those interested in them and not at the risk of those without such interest * * *." Bohlen, *Aviation Under The Common Law,* 48 Harv. L. Rev. 216, 217 (1934). The liability placed upon the employer is thus direct and has no relationship to the *respondeat superior* doctrine.

3. Still other considerations show that the absolute liability without fault theory is not the type of *respondeat superior* liability cognizable under the Tort Claims Act. Absolute liability for plane operation is predicated on the liability of the owner without regard to the liability of the pilot. It is signficant that even Section 5 of the Uniform Aeronautics Act, *supra,* p. 16, which, prior to its withdrawal in 1943,[11] adopted the absolute liability theory for airplane crashes, imposed such absolute liability only on the owner of the plane and specifically provided that the pilot himself could be held "liable only" for negligence. While the owner of the plane was absolutely liable without proof of negligence, the pilot himself could not be held liable unless he had been negligent. Therefore, under the liability without fault theory, even though the employee was not personally liable to the injured person, his employer, the owner of the plane, could be held absolutely liable. But this liability is ob-

[11] See footnote 9, *supra*, p. 18.

viously not the vicarious liability of an employer required to answer for the torts of his employee. It is a liability which arises out of ownership of the plane. It is a direct liability placed on the airplane owner as a responsibility of ownership. Plane ownership, rather than tortious conduct of an employee, is the *sine qua non* of such liability.

In this connection, it should be noted that since the *respondeat superior* relationship is essential to hold the United States liable under the Act, the fact that an automobile or truck involved in an accident was owned by the United States is insufficient to hold the Government liable even in those states where liability is an incident of ownership and is not dependent upon the use of such a vehicle in the owner's business. *Murphey* v. *United States,* 79 F. Supp. 925, 927–928 (N. D. Cal.), reversed on other grounds, 179 F. 2d 743 (C. A. 9); *Hubsch* v. *United States,* 174 F. 2d 7 (C. A. 5), writ of certiorari dismissed, 340 U. S. 804; *Fries* v. *United States,* 170 F. 2d 726 (C. A. 6), certiorari denied, 336 U. S. 954; *Williams* v. *United States,* 189 F. 2d 607 (C. A. 10); *Sanchez* v. *United States,* 177 F. 2d 452 (C. A. 10); *Glasgow* v. *United States,* 95 F. Supp. 213 (D. C. Ala). We submit that the rule should be no different where liability is predicated on ownership of a plane rather than on ownership of any other motor vehicle.

C. Comparison of the language of the Tort Claims Act with other statutes waiving governmental immunity supports our views

Other statutes allowing suit against the Government are cast in terms far more general than those employed in the Tort Claims Act and accordingly are

not limited to the *respondeat superior* type of liability.

1. The Suits in Admiralty Act provides that libels may be brought against the United States in cases where, if the government-owned merchant vessel were privately owned, "a proceeding in admiralty [could] be maintained", and further provides that such suits shall proceed and be heard and determined according to the principles of law obtaining in like cases between private parties. Section 2, 3, 41 Stat. 525, 46 U. S. C. 742, 743. The Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781), incorporating the broad provisions of the Suits in Admiralty Act, allows the filing of a libel against the United States wherever the damages are caused by a public vessel. *American Stevedores* v. *Porello,* 330 U. S. 446, 452; *Thomason* v. *United States,* 184 F. 2d 105 (C. A. 9). Under both statutes, maintenance of suit is conditioned only upon a showing that "principles of admiralty law [would] impose liability on private parties." *Canadian Aviator Ltd.* v. *United States,* 324 U. S. 215, 224–225.

The reach of these two Acts is thus much broader than that of the Tort Claims Act. Unlike the latter Act, the two admiralty statutes are not limited to damages caused by an employee who himself would be personally liable for those damages. Therefore, under the admiralty statutes, the *respondeat superior* theory of liability, the theory of liability without fault, and any other theory of liability available against a private ship may be invoked as a basis for recovering damages. For example, it is well established in admiralty that a private shipoperator is absolutely liable for maintenance and cure regardless

of fault whenever a seaman is injured in the service of the ship. The seaman is entitled to these benefits despite the fact that there was no fault or negligence on the part of the shipowner or any of his employees. *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 527; *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 730. This absolute liability may also be invoked against the United States because the two admiralty statutes are not limited to a *respondeat superior* liability. *Farrell* v. *United States,* 336 U. S. 511. For the same reasons, the absolute liability of a shipowner, irrespective of fault, for injuries caused by his vessel's unseaworthiness may be imposed upon the United States under the Public Vessels and Suits in Admiralty Acts. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 93–94; *Lauro* v. *United States,* 162 F. 2d 32, 34 (C. A. 2).

If the Federal Tort Claims Act had employed the same broad language as the admiralty statutes, there is no doubt that the absolute liability theory urged by appellant would be available to claimants under the Tort Claims Act. But the express use of such broad terminology in the admiralty statutes and its omission from the Tort Claims Act reinforces the conclusion that Congress carefully and deliberately limited the liability of the United States under the Tort Claims Act to cases based on the conventional *respondeat superior* liability.[12]

[12] Representative Lozier, in discussing one of the predecessor bills considered by Congress prior to enactment of the Tort Claims Act, referred to the liability provisions as "the application of the ancient rule in reference to the liability of the principal for the wrongful act of his agent in suits against the Government for negligence of its employees." 69 Cong. Rec. 2191. The bill under discussion, H. R. 9285, 70th Cong., covered claims "if the damage

2. The broad language of the British counterpart of our Federal Tort Claims Act compels the same conclusion. The Crown Proceedings Act of 1947 (10 and 11 Geo. 6, c. 44) announces a far broader consent to tort suit against the sovereign than does our Act. Section 2 (1) of the British Act provides (6 Halsbury's Eng. Stat. (2d ed.) 48):

> Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—
>
> (a) In respect of torts committed by its servants or agents;
>
> (b) In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (c) In respect of any *breach of the duties attaching at common law to the ownership, occupation, possession or control of property:*
>
> *Provided,* that no proceeding shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate * * *. [Italics supplied.]

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or loss was caused by the negligence or wrongful act or omission of any officer or employee of the Government acting within the scope of his office or employment"—language practically the same as that now appearing in 28 U. S. C. 1346 (b) *supra*, p. 7. See also Senator Danaher's reference to the "application of the rule of *respondeat superior*" in discussing another bill which preceded the Act. Hearings before Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., on S. 2690, p. 44.

It is apparent that subsection (a) of this section, as qualified by the proviso, imposes on the Crown the same *respondeat superior* liability announced by the Federal Tort Claims Act. But, the British legislators, unlike our own, did not want to limit liability under their Act to *respondeat superior* liability. They wanted to impose on the Crown the absolute liability attaching to the ownership of certain property. And so they added subsection (c) to accomplish that result. Consequently, the express language of the Crown Proceedings Act makes available to claimants under that Act the theory of absolute liability arising out of ownership of an extrahazardous instrumentality.[13] But the absence of any similar express provision in the Federal Tort Claims Act shows, we

[13] Glanville L. Williams, author of *Crown Proceedings* (1948), emphasizes the point that Section 2 (1) (c) of the British Act "makes the Crown liable * * * under *Rylands* v. *Fletcher*," p. 46. As noted above, p. 14, the *Rylands* case was used as the basis for the liability without fault theory adopted by the *Restatement.*

Harry Street, Esq., of the Faculty of Law of Manchester University, England, also calls attention to Section 2 (1) (c) and shows that the absence of such a provision from the Federal Tort Claims Act is particularly significant. He states:

"The United States is liable under the act only for the 'negligent or wrongful act or omission of any employee.' Some torts, however, cannot be regarded as the act of the servant, but liability for them depends entirely on the ownership of the instrumentality causing the damage. For instance, when there is a liability for the carrying on of an ultrahazardous activity, no one servant is responsible; the tort is solely that of the owner of the instrumentality. Under the act it seems that the United States will not be liable for any such acts or omissions which cannot be attributed to an employee." Street, *Tort Liability Of The State: The Federal Tort Claims Act And The Crown Proceedings Act*, 47 Mich. L. Rev. 341, 350 (1949).

submit, that the court below properly refused to invoke that theory as a basis for allowing recovery against the United States.[14]

III

Applicability of the Military Claims Act precludes relief under the Federal Tort Claims Act

For the reasons already set forth, we believe that the court below properly dismissed this action under the Federal Tort Claims Act. That does not mean, however, that plaintiffs in an airplane crash of this sort—that is, one not involving any negligent or wrongful act on the part of a government employee—are left remediless. There is full relief available in such a case under the Military Claims Act. Indeed, the applicability of the relief provisions of that Act precludes the alternative relief here sought under the Federal Tort Claims Act.

Long before the Federal Tort Claims Act became law in 1946, Congress had recognized that military activities, particularly those involving aircraft operation, would result in personal injury and property damage to private persons. Thus, a 1922 statute made provision for administrative settlement of personal injury and property damage claims "resulting from

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[14] We agree with appellant that *Ure* v. *United States*, 93 F. Supp. 779 (D. C. Oreg.), adopts the view that the absolute liability theory may be invoked in actions under the Federal Tort Claims Act. However, we believe that the considerations set forth above, pages 18–29, show that the district judge erred in adopting that view. And, when a final judgment is entered in the *Ure* case, the Government contemplates taking an appeal to this Court in order to have that error corrected.

the operation of aircraft at home and abroad." 42 Stat. 737, as amended, 56 Stat. 620; 31 U. S. C. 224. This statute was one of a series of many enactments passed by Congress between 1885 and 1942 dealing with the settlement of claims incident to noncombat military and naval activities. In 1943, Congress reviewed these numerous statutes under which a comprehensive system for settling such claims had been developed. See S. Rep. 243, 78th Cong., 1st sess. On July 3, 1943, the 1922 statute was consolidated with all of the other comprehensive statutes authorizing administrative settlement of claims incident to military activities. The consolidated statute is known as the Military Claims Act of 1943 (57 Stat. 372; 31 U. S. C. 223b). In 1945, in order "to provide the Navy with a system of laws for the settlement of claims uniform with that of the Army," the Military Claims Act was made applicable to naval activities. 59 Stat. 662, 31 U. S. C. 223d. Under that Act, the Secretary of the Navy is authorized to consider, ascertain, adjust, determine and settle claims caused by non-combat naval activities. Payments under $1,000 may be made directly by the Navy to the claimant. Administrative awards in excess of $1,000 are reported to Congress (in the same manner as are judgments obtained against the United States under the Federal Tort Claims Act) for payment under regular or supplemental appropriation bills. See *infra,* p. 39.

A. The remedy under the Military Claims Act is exclusive

It is settled law that where Congress, over a long period of time and through a series of enactments, has legislated with respect to a particular subject

matter in such a manner as to create a complete and comprehensive system for dealing therewith, subsequent statutes of general application, which would otherwise apply, are held to be inapplicable to the special subject matter. *United States* v. *Barnes,* 222 U. S. 513, 520; *United States* v. *Sweet,* 245 U. S. 563; *Ozawa* v. *United States,* 260 U. S. 178, 193, 194; *United States* v. *Jefferson Electric Mfg. Company,* 291 U. S. 386, 396; *Missouri* v. *American Trucking Associations,* 310 U. S. 534, 544; *Townsend* v. *Little,* 109 U. S. 504, 512; *United States* v. *Fixico,* 115 F. 2d 389, 393 (C. A. 10); *Iriarte et al.* v. *United States,* 157 F. 2d 105, 108 (C. A. 1). It is equally settled that the foregoing rule is fully applicable in determining whether the Federal Tort Claims Act, concededly a statute of general application, is to be construed so as to authorize relief with respect to claims theretofore covered by a comprehensive administrative and statutory system. In *Feres* v. *United States,* 340 U. S. 135, 140, the Supreme Court held the Tort Claims Act inapplicable to claims by servicemen for service-incident injuries because a "comprehensive system of relief had [theretofore] been authorized for them and their dependents by [prior] statute." Justice Jackson, speaking for a unanimous court, pointed out that—

> The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional (340 U. S. 135, 140).

Showing that that purpose would in no way be served by affording servicemen alternative relief under the Tort Claims Act, the opinion emphasizes the "bearing upon it [of] enactments by Congress which provide systems of simple, certain and uniform compensation." 340 U. S. 135, 144.

"By parity of reasoning" the "same result" was reached in *Lewis* v. *United States,* 190 F. 2d 22, 24 (C. A. D. C.), certiorari denied, No. 313, Oct. Term, 1951. There, as in the *Feres* case, a claim for damages under the Tort Claims Act was held to be barred by the claimant's eligibility for the benefits of prior statutes authorizing administrative relief. Identical considerations have compelled other courts considering various other types of legislation permitting suit against the United States to hold that the prior specific administrative remedy precludes alternative relief under the later statute authorizing suit. *Dobson* v. *United States,* 27 F. 2d 807 (C. A. 2), certiorari denied, 279 U. S. 653; *Bradey* v. *United States,* 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880; *Mandel* v. *United States,* 191 F. 2d 164 (C. A. 3); *Johansen* v. *United States,* 191 F. 2d 162 (C. A. 2).

B. The language of the Tort Claims Act confirms the exclusiveness of the Military Claims Act remedy

In holding the administrative remedy exclusive in the *Feres* and related cases the courts, as has been noted, relied on general principles of statutory interpretation. However, the need for holding the Military Claims Act remedy exclusive here is manifested not only by these general principles but by provisions

of the Federal Tort Claims Act itself. Congress in enacting the latter Act, took express note of the Military Claims Act and spelled out the exact spheres of operation of each of the two Acts.

Prior to the Tort Claims Act, the Military Claims Act was broad enough to cover claims based on (1) any wrongful act, whether intentional or negligent, and (2) acts which, though resulting in damage, were neither intentional nor negligent. Whether the damages were caused willfully, negligently or without fault on the part of the military employee was immaterial under the Military Claims Act. The fact that damages had been sustained was generally sufficient to warrant administrative approval of a claim under that Act. With the enactment of the Federal Tort Claims Act on August 2, 1946, a new remedy for damages caused by any wrongful act, whether intentional or negligent, was created.[15] And Congress made

[15] The Tort Claims Act covers damages resulting from the "negligent or wrongful" acts or omissions on the part of federal employees. Section 1346 (b), *supra*, p. 7. There is support in the legislative history of the Act for the view that the word "wrongful" was used as synonymous with "negligent" and that Congress never intended the Act to include anything other than negligent torts. Senator Danaher indicated that this was a natural interpretation of the phrase "negligent or wrongful" and prophesied that the courts would restrict the Act to tort cases arising solely from negligence. See Hearings Before the Subcommittee of the Senate Judiciary Committee on S. 2690, 76th Cong., 3d sess., p. 43. Moreover, language in pertinent committee reports shows that Congress was of the view that a tort was not "wrongful" unless it had been caused "negligently." Compare statement of Assistant Attorney General Shea using the phrase "*wrongful act or omission* on the part of any government agent" (Hearings Before the House Committee on Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess.) with the Judiciary

it clear, in enacting the Tort Claims Act, that the new remedy, within its sphere of operation, was not an alternative or supplemental remedy, but exclusive. It expressly provided that the new remedy for tort claims cognizable thereunder "shall be exclusive." Section 423, 60 Stat. 846. To make it doubly clear that there was to be no overlapping remedy, the Tort Claims Act specifically repealed the Military Claims Act of 1943 (including the extension of that Act to the Navy, as codified in 31 U. S. C. 223d) to the extent that the Military Claims Act formerly covered claims based on a government employee's wrongful conduct, whether intentional or negligent. See Section 424 (a), *supra*, p. 7.

The Tort Claims Act does not, however, apply to the second group of acts which were theretofore cognizable under the Military Claims Act, *i. e.*, those acts which, while resulting in damage, were neither negligent nor intentional. Since the Tort Claims Act does not cover these nonnegligent and unintentional acts and since Congress wanted to preserve the Military Claims Act's coverage as to these acts,

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Committee's adoption of the same statement with only one change, *i. e.*, substituting the phrase "*negligence* on the part of any government agent" (H. Rep. 1287 on H. R. 181, 79th Cong., 1st sess.).

This case, however, does not require decision on the question as to whether the Act is limited to *negligent* acts. For, even if the word "wrongful" requires that the Act be extended beyond negligent torts, it can only mean that the Act also includes some torts which were *intentionally* caused, *i. e.*, those which are deliberately wrongful. In no event may a "wrongful act" be interpreted to include *activities* which in some states can impose liability without fault. Such a liability, as we have shown (*supra*, p. 22) is imposed because of the *nature* of the activity, not for the *manner* in which it is performed.

the Tort Claims Act provides that "nothing contained [*t*]herein shall be deemed to repeal" the Military Claims Act (or any other statute authorizing administrative settlements) with respect to cases in which the damage was caused by any nonnegligent and unintentional act. Sec. 424 (b) *supra,* p. 8. For such cases, the Military Claims Act (and similar legislation) remained the appropriate vehicle for relief.

Congress, in the Tort Claims Act, has therefore marked out the exact boundaries of that Act as well as the Military Claims Act: To the extent that the latter Act covered intentional or negligent wrongs it has been superseded by the Tort Claims Act. To the extent that the Military Claims Act covered nonnegligent and unintentional acts it, rather than the Tort Claims Act, affords the only remedy.

C. Relief under the Military Claims Act has been awarded regularly to other claimants in airplane crash cases not resulting from a government employee's negligent or wrongful conduct

In view of the foregoing considerations, the Military Claims Act has been regularly invoked as the exclusive remedy for claimants who, like appellant here, have been damaged by the nonnegligent and unintentional crash of Navy and Air Force planes. See e. g. Sen. Doc. 215, 81st Cong., 2d sess., pp. 6–7, approving a claim for $3,400 for damage caused by crash of naval aircraft; Sen. Doc. 15, 81st Con., 1st sess., pp. 24–25, approving a claim for $2,481.34 for damage caused by crash of naval aircraft; Sen. Doc. 227, 81st Cong., 2d sess., pp. 2–3, approving a claim of $12,275.14 for damage caused by crash of an Air Force plane; *id.* at pp. 3–4, approving a claim for $16,924.59 for

damage caused by crash of an Air Force plane; *id.* at pp. 4–5, approving a claim for $11,240.93 for damage caused by crash of an Air Force plane; House Doc. 729, 81st Cong., 2d sess., p. 10, approving a claim of $6,146.71 for damage caused by crash of an Air Force plane.

All of the damage claims described in the above-cited Senate and House Documents were approved and paid under the comprehensive relief provisions of the Military Claims Act. Since the damages sustained by appellant's power line similarly resulted from a nonnegligent and unintentional airplane crash, we submit that the appellant's only remedy is that prescribed in the Military Claims Act.[16] The rule applied by the Supreme Court in the *Feres* case (*supra,* p. 31) and the express language of the Federal Tort Claims Act (*supra,* pp. 33–35) permit no other result.

D. The purpose of the Tort Claims Act is not served by extending its benefits to claims covered by the Military Claims Act

Two chief purposes motivated enactment of the Federal Tort Claims Act. First, it was designed to afford claimants a right to recover damages against the United States where formerly they had been remediless. We have already shown that this purpose would not be served by extending the benefits of the Tort Claims Act to the instant claim for which an effective remedy against the United States was

[16] We are advised that a claim initially filed by appellant with the Navy Department was rejected by that Department. However, as shown in the copy of our letter to appellant reprinted in the Appendix, *infra*, pp. 41–43, the Navy Department has stated its willingness to consider appellant's claim under the Military Claims Act with a view to certifying it to Congress for appropriation.

available under the Military Claims Act long before the Tort Claims Act became law.

Similarly, limiting claimants to their remedy under the Military Claims Act does not conflict with the other purpose of the Tort Claims Act recognized by appellant, *i. e.,* to shift from Congress to the courts the burden of determining the merits of numerous tort claims against the United States. See Appellant's Opening Brief, p. 17–18. The title of the Act of August 2, 1946, in which the Federal Tort Claims Act appears as Title IV, states its purpose to be "to provide for the increased efficiency in the legislative branch of the Government" (60 Stat. 812). Title I of that Act relates in general to the procedural rules of the Senate and House (60 Stat. 831), describes the jurisdiction of the various Congressional Committees (60 Stat. 815 *et seq.*), and in Section 131 specifically prohibits the introduction of any private bill proposing to authorize the payment of money for property damages or for personal injury damages for which suit may be instituted under the Federal Tort Claims Act (60 Stat. 831). As indicated in the Title of the Act, its manifest purpose, together with the concurrent prohibition of introduction of private bills, was to promote the efficiency of Congress by eliminating a serious obstacle to its legislative activity (Rep. No. 1400 on S. 2177, 79th Cong., 2d sess., pp. 7, 29; 92 Cong. Rec., p. 10049).

This obstacle had arisen because Congress, prior to the Act of August 2, 1946, had been compelled to divert a considerable portion of its time and energies to the consideration of a mass of private laws mak-

ing individual awards to private parties damaged by acts of government employees. For example, in 1943 and 1944, thousands of bills were introduced in Congress to provide compensation for aggrieved individuals, and during those years Congress actually enacted hundreds of private laws to settle tort claims against the United States. See Holtzoff, *The Handling Of Tort Claims Against The Federal Government,* 9 Law and Contemporary Problems, 311, 322 (1942); Senate Report No. 1400, 79th Cong., 2d sess., p. 30. These special Acts did not require a great deal of consideration on the floor of the House and Senate, most of them being passed on consent calendars. But these acts did drain away from other problems the time and attention of the legislators representing the constituents in whose behalf the bills were introduced, and to a considerably greater extent, the time and attention of the legislators who sat on or appeared before committees having jurisdiction over claims. Hearings Before Joint Committee on Organization of Congress, 79th Cong., 1st Sess., March 1945, pp. 68, 95, 219.

The purpose of the Tort Claims Act in transferring this work-load from Congressional committees to the courts is in no way impeded by requiring claims of the instant type to be adjudicated under the Military Claims Act. Under that Act, the claimant applies to the appropriate administrative agency and submits all the necessary information. The agency then makes its own investigation, determines the merits of the claim and the amount to be awarded to the claimant. If the award is less than $1,000, the agency makes direct payment. If the amount found due ex-

ceeds $1,000, the agency reports the award to Congress for payment under a regular or supplemental appropriation. Even with respect to the awards which exceed $1,000, no work-load is imposed on Congress. Congress does not re-investigate the claims for which awards are made under the Military Claims Act any more than it makes an independent examination of the merits of a judgment under the Federal Tort Claims Act. In fact, Congressional procedure with respect to Military Claims Act Awards is identical with its procedure in authorizing appropriations for judgments awarded by courts under the Tort Claims Act. In both instances, all that Congress does is make the formal appropriation. As shown by the Senate and House Documents cited *supra,* pp. 35–36, appropriations for judgments under the Tort Claims Act are submitted in the same requests and at the same time as appropriations for payments of claims administratively allowed under the Military Claims Act.

A procedure which merely requires the appropriation of money obviously does not impose upon Congress any of the cumbersome workload caused by the introduction and consideration of a mass of private bills. After introduction by the legislator, representing the claimant, these private bills were referred to either the House or Senate Committee on Claims which had to undertake time-consuming investigations and hearings so as to determine the merits of the claim and the proper amount payable to the claimant. The Tort Claims Act was intended to enable Congress to rid itself of this workload. That purpose is in no way interfered with when claims are administra-

tively allowed under the Military Claims Act and all that is left for Congress to do is to make the same sort of formal appropriation it provides for judgments awarded under the Tort Claims Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

(Copy)

UNITED STATES DEPARTMENT OF JUSTICE,
WASHINGTON 25, D. C., *October 30, 1951.*

AHB: MH
157-12-207

AIR MAIL

DONALD J. CARMAN, Esquire,
California Electric Power Company,
Riverside, California.

Re: California Electric Power Co. v. *United States*
(*No. 13059, C. A. 9*)

DEAR MR. CARMAN: I want to thank you for the copies of the record and your brief in the above case.

As you know, it has been our consistent position that the facts of this case, which fail to disclose any negligent or wrongful act on the part of government employees, preclude recovery under the Federal Tort Claims Act for the damages caused to your transmission line because of the crash of the Navy drone plane. The district court accepted our position and awarded judgment in our favor. If your appeal is prosecuted, we will strongly urge the Court of Appeals to accept our position and affirm the judgment.

However, while your claim for damages is not cognizable under the Tort Claims Act, it does appear appropriate for consideration by the Navy Depart-

ment under the Military Claims Act, as made applicable to the Navy by the Act of December 28, 1945 (31 U. S. C. 223d). The latter Act empowers the Navy to consider, approve, and report to Congress for payment claims which are in excess of $1,000, and which, although caused by Navy noncombat activity, are not the result of any negligent or wrongful act on the part of a government employee acting within the scope of his employment. If the claim does result from such a negligent or wrongful act, then, unlike your claim, it is cognizable under the Federal Tort Claims Act and not the Military Claims Act.

I understand that your company filed a claim with the Navy department within the one-year period allowed by the Military Claims Act. The Navy Department has advised me that upon request from you it will be willing to consider your claim under the provisions of that Act with a view to certifying it to Congress for appropriation. In this connection, I want to point out that many other claims arising out of the crash of military airplanes not caused by any negligent or wrongful act of a government employee have been administratively approved and uniformly paid by congressional appropriation under the Military Claims Act. It is reasonable to expect, therefore, that your claim would receive the same favorable consideration.

If you decide to ask for such consideration under the Military Claims Act, please let me know at once and I will advise the Navy Department. In addition, it will be necessary for you to move the Court of Appeals for postponement of the present proceedings pending Navy consideration and congressional

action on the claim. If, on the other hand, you decide not to ask for such consideration, your prompt reply to that effect will also be appreciated.

Sincerely yours,

HOLMES BALDRIDGE,
Assistant Attorney General.

cc: Director, Div. III,
Office of the Judge Advocate General,
Department of the Navy,
Washington 25, D. C.

Ernest A. Tolin, Esquire,
United States Attorney,
Los Angeles, California.

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